

The Street Impact Fee Appeals Board Hearing Minutes

Fresno, California September 24, 2008

The Street Impact Fee Appeals Board met for a special meeting at the hour of 4:00 p.m. in Council Chambers, City Hall, on the day above written.

Roll Call led by Michelle Hernandez, Appeals Board Clerk

Present: Elliott Balch Chair Appeals Board Member
Ray Dunn Vice-Chair Appeals Board Member
Ed Dunkel Appeals Board Member
Patrick Wiemiller Appeals Board Secretary
Michelle Hernandez Appeals Board Clerk

Additional Parties Present:

Alan Kawakami, City of Fresno, Chief Engineering Technician
Rick Sommerville, City of Fresno, Supervising Engineering Technician

Absent:

Margaret Arechiga Appeals Board Member

Chairperson Balch led the Pledge of Allegiance.

Minutes Approval:

On motion of Appeals Board Member Dunkel, seconded by Appeals Board Member Vice-Chair Dunn, duly carried, RESOLVED, the **minutes** of April 23, 2008.

Approve Agenda:

On motion of Appeals Board Member Vice-Chair Dunn, seconded by Appeals Board Member Dunkel, duly carried, RESOLVED the **AGENDA** hereby approved, by the following vote:

Ayes : Balch, Dunkel, Dunn
Noes : None
Absent : Arechiga

Continued Appeal Hearings:

No appeals were scheduled for continuance.

Scheduled Appeal Hearings:

No appeals were scheduled for hearing.

Unscheduled Oral Communications:

No unscheduled oral communications were discussed.

Reports From Board Members:

No reports from Board members were discussed.

Report From Secretary:

Recent Activity on Development Impact Fee Deferrals and Payments:

Board Secretary Wiemiller:

"We were approached by some selective members of the BIA (Building Industry Association). We expanded our discussion broadly to bring in the BIA. Some understanding on their part was once UGM always UGM blanket of

coverage; therefore the Major Impact Street Fees were not going to apply to them. And that wasn't the case and if you were to read the by-laws it would be listed. Some folks did not realize. We are working through that. They definitely are not going to work out the grace period of up to five years. We said no we are going to reconcile those misunderstandings right now within 6 months or less. Pay what you owe and bring you to where you need to be. I am not sure if this is going to lead to any activity of this Board, however if it does the deliberations that you would take would be based upon the additional information to come. It is basically a "heads up" to make clear understanding rather than to take chance their might be litigation out of something that is writing and may be subject to interpretation; rather then go down that path we forward with the plan that is agreed to by all."

Chairperson Balch:

"Is this something that Council might bring to this Board amending the ordinance?"

Board Secretary Wiemiller:

"Right, if it involves a re-write or minor amendment. We plan to go to Council. We were already planning to go to Council but was pushed back because of some other issues getting resolved. If this were to happen all it would take is a minor / brief workshop in order to say this is where we are this is where we were so that we understand where the setting is now."

Vice-Chair Dunn:

"So some of the actions we've taken previously might be modified as a result of?"

Board Secretary Wiemiller:

"I'm not anticipating that they will be; but, I am not going to rule it out either. To the extent that they do we will definitely appraise you based on the facts you took this information. Based on our new understanding it might have affected this and this or this."

Vice-Chair Dunn:

"Ok."

Board Secretary Wiemiller:

"This concludes my Secretary's Report. Before we get to adjournment, also related back, I was not in attendance at the April 23, 2008, meeting Board Member Dunkel raised issue and Planning and Development staff has prepared themselves to address that issue and have been waiting expectantly as we have had canceled meetings. So we would like to take this opportunity to allow them to present their report on that. With that it looks like Mr. Sommerville will take the floor."

Rick Sommerville, Planning and Development:

"Board President and Board Members since the last part of May I have included in you packet a spreadsheet of prepaid fee referral fees. It has been common practice for a developer to come in with prepaid fees before the increase goes into effect or it is replaced by a new fee so there has been ~ going back a few years we found data of over 850 lots that have prepaid their fee. It is common practice, most of the developers do and are aware of it and do partake in it including the developer who brought this up in the last appeal also had done this before. So they said they were unaware of it but they were because they had done it. And the fee referral covenant does; there is a couple of places in the covenant where they signed we record: The covenanter may elect to pay any of the deferred fees prorated to each lot, parcel, unit, or building identified in the attached exhibit at any time the full amount of such a fee must be paid. So it's uh spelled out in his covenant that you can't prepay them you have to pay them all you can't just pay half of it. This concludes my report. Any questions you may have?"

Board Secretary Wiemiller:

"Rick. just for the redundancy of clarity here, it is here first of all that they paid their grandfather if you will they're locking in fees it is a total lock in to the extent that we do some major adjustment in fees, we really do reach a time of Dequincy they pay the fines if they are covered if not they are coming under exposure to additional..."

Rick Sommerville:

"Right, on the spreadsheet you see a lot of the earlier ones on the bottom of the spreadsheet you see a lot of the earlier they came in to beat the fee increases. Once the fee is paid it is paid. And then there were the City Council adopted the City wide park and fire UGM fees so if you loose your vesting rights on a final map that had to defer the UGM Park and Fire they can pay their park and fire prior to the expiration to their vesting rights and not have to pay the City Wide Park and Fire when they pull permits. This is where the grey area is and then the four maps in the orange top those tracts came in to prepay their UGM fees to also not only beat the street fees but the park and fire also."

Chairperson Balch:

"And that money is paid because there was some discussion between the difference between paid and agreement to pay and paying."

Rick Sommerville:

"Right."

Vice-Chair Dunn:

"Check Cleared."

Chairperson Balch:

"Check Cleared Right."

Board Secretary Wiemiller:

"For those who do pre-pay their fees; what is the time frame which a project can survive uncompleted or un-built but still have the protection of the paid fees? Is there a set time limit or is that a perpetuity issue?"

Rick Sommerville:

"There are not limits; once they satisfy their obligation and it stays satisfied. The fees are usually based on the house unit or on the land portion share of the land."

Board Secretary Wiemiller:

"Is there anything that removes that protection, if you will...say a change of ownership or a change of land use?"

Rick Sommerville:

"No, I don't think either one of those but where a permit was issue then the vesting rights go with that permit. If they allow that permit to expire and come for a new permit we look at it as if for a first time. If the fees are deferred for occupancy they pull a permit the permit is expired and they come back in we revisit like if it was a brand new project."

Patrick N. Wiemiller:

"And for the purposes of this Board, that one of those issues that might be a triable issue for them as if someone were to go back in with the theory that it shouldn't be like new to me I've paid those fees and even if it expired."

Rick Sommerville:

"It could be. If they pulled a permit before their vesting map expired pulled their building permit and didn't final that permit and had to pull a new permit then we would reassess what fees are due and they could very well, if they haven't satisfied the UGM street bridge then we access the new street fees."

Chairperson Balch:

"Do our review criteria encompass that scenario, because I am..."

Board Secretary Wiemiller:

"What I am anticipating is, and I don't know how soon those things might come about, but I wanted to raise that issue and make the Board the sensitive, me sensitive to the fact as to where it may become a critical issue. And I think that's one of those areas and knowing how folks will work with the idea of how they think they have an entitlement and they let something lapse perhaps out of a clerical oversight with maybe their own process and those will become issues of facts that you will have to deal with and we want to make sure you are sensitive, aware, and informed on those criteria. That is why I think this is a pretty critical presentation."

Vice-Chair Dunn:

"To be clear; the clock does not start until a permit is pulled. If a permit is never pulled, is there such a time where they would have to go back and repay?"

Rick Sommerville:

"If they enter a fee deferral covenant and record their final map then the state will allow them 2 years, it freezes what we can charge them at the City. And provided they pulled a building permit prior to them the expiration of their vesting rights then it's what's in effect at that time. If and then that permit can go on, not endlessly, but for quite a while as long as they obtain inspections the permit can stay alive. So, actually the vesting rights could have expired, but as long as they pulled the permit prior to that, and the permit has not died; then their final could be a year and half later they can pay what was due at the time of the permit being pulled."

Chairperson Balch:

"The vesting rights are always 2 years?"

Rick Sommerville: "Yes, the State map act says the government agency will grant no less than one year but no more than 2 in the City of Fresno has always been 2 years."

Chairperson Balch:

"Other questions?"

Board Member Dunkel:

"I think my question may have been, did the Council understand that when? I mean, the way it is written is somewhat ambiguous. I mean, do you think Council understood this when it was brought upon them?"

As far as what their fee obligation was, I think, did the Council that a deferment did not met the obligation? I mean, it met the obligation, but it did not, but it opened it up to a new fee. That is what I was trying to bring up. If this were to go in front of a court of law or something would that..."

Board Secretary Wiemiller:

"I don't recall in the aftermath, I wasn't around for to engage in the initial, when it was presented to Council. But, reading the aftermath I don't remember all that."

Rick Sommerville:

"I know that during the Stakeholders meetings prior to coming to Council, we did have periods where we had examples of fees and what would be due at certain situations. One of those we covered was if they did have a vested map, a final map that would the fee deferral cover? If that had expired, would they be charged? We went through several different

scenarios.”

Board Secretary Wiemiller:

“A rather tortured process. As for those Stakeholders, it should have been known because there was details fully embedded and understandings, as I was told.”

Rick Sommerville:

“It was. We did have examples and questions on the actual application. The were well intended. It was in the neighborhood of more than 40 to 50 people in attendance at each of those meetings.”

Vice-Chair Dunn:

“I guess it comes down to more procedure for us: When we rule on something are we looking at it as an uneducated as far as the process goes? Or are we supposed to know what happens behind the scenes? I guess that is my question. If we are a ruling body how are we supposed to rule on something like this?”

Board Secretary Wiemiller:

“I think that is a great question. As I understand your role, you should be a trier of fact. As we discuss the issue of where the facts are based upon the preponderance of the evidence it indeed happened, what time it happened based upon the law is written. To the extent there are things that are not address, then I think you stop being a trier of fact and become a trier of the law at that point and you try to understand what the intention was of a particular issue. At that point, this is where I think having background information may become very relevant in understanding, uh , like the statement Mr. Sommerville made at the end, “it was very well intended, it was very well know, we were very clear. We went to pain staking detail.” For someone to say that wasn’t really spelled out and I don’t know if it was called out. Then at that point it may be important to have that background information. So, it’s ... I say you are a trier of the fact first, but absent this might end up black and white and did this match here? Then you become this other trier of the law at that point. If there needs to be clarification, there are a number of ways that can be carried out. There are ways you can be overruled. They can appeal your judgment to the Council which eventually establishes that law. They ultimate have the ability to litigate or the ability to negotiate and mediate, arbitrate. And so, those things are there. But, I believe you have a role to take at even if it is not called out, at least make your call the best that you can based on the information you have. There are appeal process that go on.”

Chairperson Balch:

“I would like to say, the scenario like the one we talked about where there seems to be a bit of vagueness or oversight in the actual thing that was adopted by Council and if there is a back story about how the process the developer had to go through with Planning or with PW. If we deny an Appeal based on those type of facts then it may be appropriate to send those to Council so that Council can see that there may be a larger problem.”

Board Secretary Wiemiller:

“Exactly so. And to that extent then, I would anticipate if you encounter those scenarios obviously the verbal testimony is important and you ability to ask it is important that you ask clarifying questions and get clarifying answers then. I think it will also be very critical that each side states their case and puts it in writing in, as much as possible. Hopefully in a concise executive summary form, but nonetheless, with all the relevant points. Not only so that you have clarity for your deliberation, but also so we have that record without having to produce a new record. Have the parties’ make their case and that will carry itself forward if there are subsequential appeals processes going to Council and wherever else. So, while it always good to have the Board feel it is equipped to make the decision on the day of the appeal; if you are not fully comfortable in making that decision I think it is fully appropriate for you to state your position if you need to for a short period of time ask the parties to deliver so that you have that record reconvene, make your call, and send the case forward if it needs to go forward.”

Board Member Dunkel:

“Can the document be modified?”

Board Secretary Wiemiller:

“Yep ~ it takes an action adopted by the Council and modified by Council.”

Board Member Dunkel:

“City Council?”

Board Secretary Wiemiller:

“Yes, City Council.”

Board Member Dunkel:

“What are you thoughts on making that a little more clear? Maybe adding a statement in there that says that ‘deferments do not meet the obligation.’”

Vice-Chair Dunn:

“I think something needs to be called out because that was the whole issue...makes it clear to the developers.”

Board Member Dunkel:

“Maybe they should have been, but then there is no question if that little statement is in there.”

Vice-Chair Dunn:

“Yea, they could plead ignorance, too. That's their defense.”

Board Member Dunkel:
"The beautiful thing about that is then they can't claim exempt."

Vice-Chair Dunn:
"Yea."

Chairperson Balch:
"But, you are working on something to take to Council, right?"

Patrick N. Wiemiller:
"Well, we are and this particular point might be well timed to include and rather than make them dial it back and forth it would be better once."

Chairperson Balch:
"Variety pack one."

Board Secretary Wiemiller:
"Yea."

Vice-Chair Dunn:
"Has there been any push back? Has there been any appeals to Council?"

Board Secretary Wiemiller:
"I don't know of any. No, I don't believe any of your action has been appealed."

Vice-Chair Dunn:
"They are aware that is the process?"

Board Secretary Wiemiller:
"I assume, they definitely have copies in their hands. If they are not aware it is because they chose not to educate themselves not because the education isn't available."

Vice-Chair Dunn:
"Okay, thank you."

Chairperson Balch:
"Any more on this item? Well, thank you very much. Well, I guess we will move to item 11; Motion to Adjourn."

Vice-Chair Dunn:
"So move."

Board Member Dunkel:
"Second."

Chairperson Balch:
"Motion to second. All those in favor?"

Ayes : Balch, Dunkel, Dunn
Noes : None
Absent : Arechiga

ADJOURNMENT:

There being no further business to bring before the Street Impact Fees Appeals Board, the hour of 4:36 p.m. having arrived and hearing no objections, Chairperson Balch declared the meeting adjourned.